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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL GUIDRY,

Petitioner,

VERSUS

CONTINENTAL OIL COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT, MARLIN DRILLING COMPANY, INC. IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Respondent Marlin Drilling Company, Inc. is dissatisfied with the statement of the question as presented by petitioner. Respondent would state the question presented in this manner:

Does the ruling of the Fifth Circuit conflict with the standard of care imposed on the shipowner by *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, _____ U.S._____, 101 S. Ct. 1614, _____ L. Ed. 2d _____ (1981) where the facts are beyond dispute petitioner's injuries were caused soley by an isolated act of negligence occurring within the confines of an operation assigned to his employer, a specialist, rather than by a dangerous condition on the ship or by defective ship's gear ?

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iii

Concise Statement of the Case 1

Summary of Argument 6

Argument 6

Conclusion 12

Certificate of Service 14

TABLE OF AUTHORITIES

Page

Cases:

Santos v. Scindia Steam Navigation Company, 598 F. 2d 480 (9th Cir. 1979) 7

Scindia Steam Navigation Co., Ltd. v. De Los Santos, 101 S. Ct. 1614, (1981) ..... i, 2, 6, 7, 8, 9, 10, 11, 12

Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 91 S. Ct. 514, 27 L. Ed. 2d 562 (1971) 6, 7, 8, 9, 10

Statutes:

33 U.S.C. 905(b) 6, 10

46 U.S.C. 688 1

Miscellaneous:

Restatement (Second) of Torts, 343A(1) 1, 6, 7

CONCISE STATEMENT OF THE CASE

A. *PROCEEDINGS BELOW*

The original action of petitioner was against his employer Offshore Casing Crews, Inc. ("Offshore") under 46 U.S.C. §688 (the Jones Act), Marlin Drilling Company, Inc. ("Respondent"), the owner and operator of the drilling vessel MARLIN 6 under the General Maritime Law, and Continental Oil Company ("Continental") as the lease holder and contractor of the services of Offshore under the General Maritime Law. The District Court dismissed the claim against Offshore by summary judgment on the finding that because petitioner lacked permanent assignment to a vessel he was not a seaman. The case was tried on the merits as to respondent and Continental. At the close of the petitioner's case, the trial court granted motions for directed verdicts in favor of both respondents. As to Marlin, the trial court found the evidence was "without any controversy whatever" that the cause of the occurrence was not the condition of MARLIN 6 nor her appliances but the isolated act of negligence of petitioner.

The judgments of the lower court were sustained in their entirety on appeal in the United States Court of Appeal for the Fifth Circuit. The Fifth Circuit applied its jurisprudence which embodies the *Restatement (Second)* of Torts standard for landowners to decide the merits of the appeal against Marlin. However, it also stated in dictum that even if the "reasonable care" under the circumstances rule of the Ninth Circuit was applied the trial court's directed verdicts passed muster. The Fifth Circuit agreed the evidence taken in the light most favorable to petitioner failed to indicate the accident was caused by other than the negligence of the contractor (Offshore) within the area of its operations.

Petitioner's application for a writ of certiorari is based on the contention the jurisprudence of the Fifth Circuit is contrary

to the holding of *Scindia Steam Navigation Company, Ltd. v. De Los Santos, supra,* and since this jurisprudence was accepted as controlling the appeal, the Fifth Circuit's ruling must be overturned. Respondent contends that whatever may be the rule heretofore applied generally in the Fifth Circuit, its ruling on petitioner's appeal was not only entirely consistent with *Scindia* but mandated by it. Under *Scindia* no other result than the finding in favor of respondent would be permissible.

Respondent is dissatisfied with the statement of facts of petitioner. In particular, respondent feels the phrasing of the issue presented on certiorari in terms of "dangerous condition" and "defective ship's gear" and the corresponding treatment of the facts by petitioner in those terms is misleading. For these reasons respondent offers its own version of the facts as being far more consistent with the findings of the trial court and approved by the Fifth Circuit.

B. *STATEMENT OF THE FACTS*

Petitioner received personal injuries on July 6, 1976, on board MARLIN 6 while employed by Offshore as the pusher of a casing crew. Petitioner was an experienced, seasoned and expert casing hand. The accident occurred during a rigging up operation to run casing. In conformity with custom in the industry based on the expertise and specialized nature of the work of casing crews in general, the rigging up work was done under the sole supervision of Offshore's pusher, in this case, the petitioner.

Casing is large, heavy pipe placed in an oil or gas well as drilling progresses to prevent the hole from collapsing on itself. Offshore, the plaintiff's employer, is a specialist in the setting and removal of such casing.

Casing is handled with specialty tools consisting of elevators, baffle plates, spiders, tongs and a power unit to operate same,

all of which are supplied by the casing contractor. When a casing operation is to be performed, a casing crew with tools is contracted for. In this case, Continental as the owner of the well, contracted for the services of Offshore. The casing crew is informed of the size and length of the casing, and then under the sole direction of the pusher, assembles its equipment, rigs up and runs casing.

Petitioner worked on rigs situated on land and water including fixed structures and drilling vessels. The evidence at trial indicated and the Court found petitioner was not permanently assigned to a vessel and was not a seaman. Petitioner by failing to include in his application for certiorari any request for relief from this finding has presumably abandoned the contention he was a seaman. The employment history of petitioner merits no further attention.

During July, 1976 Marlin was under contract to drill one or more wells for Continental at East Cameron Block 42, OCS (more than 3 miles off the coast of Louisiana). The drilling operation was being conducted from Marlin Rig No. 6, a self-elevating mobile drilling platform more commonly known as a "jack-up rig" which is capable of floating from one location to another. It is conceded to be a "vessel".

The drill floor of the Marlin Rig 6 has an upset rotary table, one which is not flush with the surrounding deck but elevated some 6 - 8 inches. The draw works are situated at the rear of the drill floor, the V - door, through which the drill pipe and equipment is brought onto the drill floor is directly opposite the draw works. On the drill floor are three lifting devices, the principal one being the main drum of the draw works from which the drill line, etc., is suspended. There are two auxillary lifting devices, the catline which operates off of an auxillary drum on the draw works and the air hoist, a separate device, which is operated from a control console situated adjacent to the V - door. The catline is operated from the

driller's stand which is on the side of the draw works. From the driller's stand, the view of the drill floor and V - door is through a "peep hole". The view of the V - door and the drill floor from the air hoist console is unrestricted, however.

At the appropriate time in the drilling of this well, the drill pipe, in three thirty-foot section stands of ninety feet length each, were removed from the hole, placed in the fingers of the derrick and a casing crew was called out to the location. Petitioner was in charge of the crew which was sent; the second in command was another Offshore employee, Mike Hazlett. After waiting one day, the casing crew was called to the drill floor to start running casing. The casing crew was in complete control of the floor once they started to rig up.

When the casing crew arrived on the drill floor, the Marlin crane operator had already lifted the hydraulic unit onto the drill floor and it was situated in the V - door. The petitioner and one of his crew moved the hydraulic unit out of the V - door with the use of a jerk line. The jerk line was rigged by running the air hoist line through a snatch block attached to one of the legs of the derrick which converted the vertical lifting capability of the air hoist to a horizontal force. In about 10 minutes the unit was moved. Meanwhile, the Marlin crane operator was placing in the V - door the balance of the casing equipment consisting of the spider, baffle plate, elevator and tongs. This equipment was unslung from the crane line by petitioner's co-employees and left in close proximity to each other in the V - door.

The petitioner assisted in moving the hydraulic unit, but then became aware Mike Hazlett, the second in command, was moving the elevators into position for rig up. Hazlett had previously dispatched one of his crew to operate the catline and the latter was at the driller's stand observing through the peep hole. Because of the restricted view, Hazlett was giving hand signals to the catline operator. Hazlett had al-

ready attached the catline to one of the ears of the elevator and given the signal to pick up when petitioner first became aware of the procedure. As the elevator was picked up, it bound up on one side on either the spider or the horseshoe which it was laying between. Hazlett was manually guiding the elevator from a position outside the moment, that is, he was not between the elevator and its center of gravity which was roughly the hole in the rotary table. When the elevator hung up, petitioner went to assist Hazlett. Unlike Hazlett, he positioned himself within the moment of the elevator, that is, between the center of gravity and the rotary table. Under Hazlett's constant signal, the catline operator continued lifting the elevator until it suddenly twisted and pushed against petitioner who slipped and lost his balance. The elevator swinging free towards the center of gravity then trapped and smashed petitioner's foot against the upset rotary table.

At the time of the accident, the jerk line which had been used to move a much heavier piece of equipment, the hydraulic unit, was still rigged up. The jerk line could have been employed to separate the equipment in the V-door. Had this been done, the elevator would not have bound up. The decision not to use the jerk line or to separate the equipment was made by Hazlett. However, Hazlett was positioned so that he was not between the elevator and its center of gravity and the elevator could not have swung in a direction which presented a danger to him. Likewise, in a protected place, the restricted view of the drill floor from the driller's stand was not a factor in the safe performance of the job. The operation was safe when performed by Hazlett from his position outside the arc of movement of the elevator.

Prior to the time Hazlett undertook to move the elevator with the catline, the equipment in the V - door constituted no danger to anyone including petitioner. All aspects of the drill floor including the position of the elevator against the other pieces of equipment was open and apparent. No piece of equip-

ment utilized in this rig up procedure failed to perform as it was intended to. There was no defective gear. There was no appliance which was not reasonably fit for its intended purpose.

The cause of the accident was the isolated act of operational negligence of either Hazlett in deciding to move the elevator as it lay in the V - door instead of spacing out the equipment alongside it, the negligence of petitioner in assuming a position of danger between the elevator and its center of gravity or of both in failing to adopt an alternate rig up chronology.

SUMMARY OF ARGUMENT

Both lower courts considered the evidence in the light most favorable to petitioner and correctly concluded it was caused by the operational negligence of petitioner or his co-employees. There was no defective ship's gear nor any unreasonably dangerous condition which caused or contributed to the accident. Respondent was entitled to rely on the expertise of the specialist, Offshore, and was under no obligation to supervise or inspect its work.

The rule of *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 949, 91 S. Ct. 514, 27 L. Ed. 2d 562 (1971) which holds that a shipowner is not liable for an act of operational negligence by a specialist was not abrogated by *Scindia*. The accident in question occurred as the result of an act of operational negligence by the specialist, thus *Usner* not *Scindia* is directly controlling.

ARGUMENT

The decision of the Fifth Circuit insofar as it pertained to respondent, was based on its prior jurisprudence interpreting 33 U.S.C. §905 (b). The Fifth Circuit had previously adopted and ostensibly utilized in the decision of this case as its negligence standard Section 343 A (1) of the *Restatement (Second)*

of Torts. The Fifth Circuit acknowledged that the Ninth Circuit had established a contrary standard in its decision in ***Santos v. Scindia Steam Navigation Company***, 598 F. 2d 480 (9th Cir. 1979), reversed, ***supra***, by This Court on April 21, 1981. However, it is important to note the Fifth Circuit stated that in reviewing the facts before the lower court under either standard, its (the lower court's) decision was correct. According to the Fifth Circuit, under either the ***Restatement*** or the "reasonable care under the circumstances" rule of the Ninth Circuit, petitioner had failed to show respondent breached any duty owed to him. Moreover, although not specifically referred to as such, it is obvious the Fifth Circuit concluded the accident arose from the operational negligence of the casing crew rather than from a dangerous condition.

The great attention devoted by petitioner to the small details of the accident do not change its character. All equipment functioned as designed. The dangerousness arose only as a result of the method of operation utilized by the specialist, the casing crew. Therefore, the precise question presented to The Court by this petition for certiorari is not that which was presented in ***Scindia***, namely when the shipowner discovers the stevedore is continuing to use defective ship's gear, does he have a duty to intervene ? Rather, the real question is one which This Court answered ten years ago, namely: Is the shipowner liable for the isolated act of operational negligence of a specialist working aboard its vessel ?

Factually this case is a brother to ***Usner v. Luckenbach Overseas Corp., supra***, and only a distant relative of ***Scindia***. ***Usner*** squarely held that a shipowner was not liable for the operational negligence of a stevedore. ***Scindia*** is an affirmation of same with an exception which has no play in the facts of this case.

In ***Usner*** a winch operator was lowering a fall to the plaintiff who then secured it to the cargo. On the occasion of the

accident, the winch operator failed to lower the sling far enough and the plaintiff motioned him to lower it further whereupon the winch operator did so but too fast and caused the plaintiff to be thrown to the deck. It was concluded the accident was caused by an operation, not a condition, and consequently, the shipowner was free from fault.

The application of *Usner* or *scindia* to determine shipowner liability is determined by the characterization of the injury producing mechanism, operation or condition. That the case at bar involved the former is revealed by an analysis of the allegations of petitioner.

Petitioner expounds in great detail on the little or lesser important aspects of the mechanics of the accident and he consistently gives little consideration to the more significant components. The *sine qua non* was not the (1) inadequate peep hole; (2) the existence of ten thousand feet of drill pipe in the V - door (sis) (the evidence was undisputed that it was standing in the derrick); (3) mud and water on the drill floor; (4) the placement of the casing equipment in the V - door; (5) the placement of the power unit on the drill floor; or (6) the upset rotary table. These details merely describe the physical location of the occurrence. The crux of the accident lay in the method of operation selected by petitioner. Conditions would never have coalesced into a dangerous condition per se. The danger arose only when the elevators were lifted while petitioner was positioned between them and their center of gravity. The voluntary positioning of petitioner was *the great* detail of the accident.

The six conditions alone or altogether were not important, nor beyond the control of petitioner and his crew. Where the condition was not itself correctable by petitioner, there were alternatives available which would have avoided any danger. The jerk line could have been used to space out the equipment and then move the elevators. The operator of the jerk line

had an unrestricted view of the drill floor. The catline's use was neither improper nor dangerous if petitioner had put himself where Hazlett was. The power unit was on a corner of the drill floor; how it could have been a causative factor is not readily apparent. Petitioner had control of the floor and the means to clean it if he wanted; furthermore, the "mud and water" was not the cause of the accident. The upset rotary was an apparent condition and was not dangerous. It merely furnished the locale for the accident. The central thesis of respondent's position is simply that no dangerous condition or defective gear existed. This position has received the imprimatur of approval from the district and appellate courts.

Petitioner seeks to convert the "operation" to a "condition" simply by calling it such.

Respondent submits the occurrence was from an operation, not a condition, and *Usner*, not *Scindia*, is directly controlling.

The holding of *Usner* that a shipowner is not liable for the negligent operation of the stevedore was endorsed in *Scindia*.

> "The shipowner, within limits is entitled to rely on the stevedore, and owes no duty to the longshoreman to inspect or supervise the cargo operations." 101 S. Ct. at 1624.

> "If the effective cause was a simple act of operational negligence by the crane operator or the hatch tender, the vessel would not be liable in any event". Footnote 26, 101 S. Ct. 1627-28, citing *Usner*.

The "more difficult and recurring issue" present in *Scindia* does not present itself in this case because the facts do not indicate any defective gear played a causative part in the occurrence. *Scindia* invites attention only by posing the ques-

tion whether it should be extended by analogy to impose a duty on the shipowner to intervene if he knows the specialist will commit an unsafe act within the confines of operations assigned to it ?

The knowledge by the shipowner of the continued use of the defective winch by the longshoremen in *Scindia* deprived it of the immunity which would have otherwise been afforded it by recognition of its lack of a duty to supervise or inspect the operations of the stevedore. That a shipowner had no duty to discover and remedy an open and obvious dangerous condition because it could rely on the expertise of the stevedore was recognized. Only where there was a showing the stevedore failed to correct it coupled with a showing the shipowner knew of it, could the shipowner be found liable. The ingredients to 905(b) shipowner liability under *Scindia* are (1) a dangerous condition or defective gear, (2) actual knowledge of the condition by the shipowner, and (3) knowledge the stevedore has continued its operations in spite of the dangerous condition.

As stated above, *Scindia* itself does not apply per se to the case at hand because there was no dangerous condition, no defective ship's gear. Moreover, *Scindia*, if it does announce an exception to *Usner* would certainly require as a predicate to the existence of a triable issue a showing of knowledge by the shipowner of a continuing and unreasonably dangerous method of operation by that contractor. The question of *Scindia* application ***vel non*** where no defective ship's gear is present is raised only for the purpose of demonstrating the striking dissimilarities between it and this case; without a showing of actual knowledge of a danger, be it from a condition, a piece of gear or an operation, *Scindia* neither by its literal holding nor by analogical extension, indicates any conflict with the ruling of the Fifth Circuit or the trial court. The Fifth Circuit plainly found wanting any evidence of actual knowledge on the part of respondent of any danger.

"Reviewing the facts in light of either or both of these

standards, 1/ Guidry has not shown Marlin (i) knew or had reason to know of any unreasonably dangerous condition, and (ii) failed to exercise reasonable care to make the condition safe or warn him. The equipment was sitting securely on the rig floor when Guidry arrived on the rig floor. No Marlin employee was on the rig floor at the time the accident occurred. Guidry was the sole supervisory person on the rig floor when he was injured. It was Guidry's duty, not Marlin's, to assure his co-employees were conducting their work in a safe manner. Guidry, under the circumstances of this case, may not claim any actions taken by Marlin prior to his arrival on the rig floor caused the accident. If location of some of the tools afforded some obstacle to a safe performance of the work, the condition was perfectly apparent to all with no showing that the condition or its hazards would not be known to Guidry and his crew. Indeed, ***Guidry did not challenge this fact, nor was there any sufficient showing that Marlin should realize that it involved an unreasonable risk to Offshore's workers.*** Under such circumstances we must deny Guidry recovery for it is well settled '[i]f either the [contractor] or his employee is in [a] better position to appreciate fully the [obvious] risk and avoid the danger, particularly where the danger is within the control of the [contractor's] own employees', the vessel owner will not be liable." Id. (quoting ***Stockstill v. Gypsum Transportation***, 607 F. 2d 1112, 1117 (5th Cir. 1979). (Emphasis supplied)

The Fifth Circuit's holding obviously fits quite comfortably

1/ Comparing the Ninth Circuit's standard in *Scindia*, 598 F. 2d 480 (1979) with the Fifth Circuit standard first announced in *Gay v. Ocean Transport & Trading, Ltd.*, 546 F. 2d 1233 (1977).

into the resolution by *Scindia* of the "easier" issue namely: A shipowner is not liable for dangers not known to him which have occurred within the confines of the independent contractor's operation. Thus, under another name like a rose which would still smell as sweet, the ruling of the Fifth Circuit, although announced under the aegis of a partially discarded standard of care, is a ruling which should be left undisturbed as representing a standard of care fully consistent with *Scindia* based on the facts of this case.

CONCLUSION

A shipowner has no duty to supervise the operations of independent contractors working aboard its vessel. A rule which obliges a shipowner to repair defective ship's gear if it knows an independent contractor will utilize it in its operations without repair and expose the contractor's employees to unreasonably dangerous conditions does not have as its logical corrollary the requirement the shipowner supervise the operations of independent contractors to insure they will not bring into play conditions not per se dangerous but with a dangerous potential where reasonable alternatives are available. Since in the first instance the shipowner is entitled to rely on the expertise of an independent contractor holding itself out as an expert, it is not incumbent on the shipowner to recognize a condition not inherently dangerous but with a dangerous potential and warn or supervise the employees of an expert possessed of knowledge and skill at least equal to that of the shipowner not to bring into play that dangerous conditions.

The shipowner who furnishes a reasonably safe place to work, and reasonably safe appliances is not liable for the unforseeable negligent use of same by an independent contractor. Absent proof of *actual* knowledge of misuse under *Scindia*, the shipowner is entitled to a directed verdict in its favor.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari have been served on the following counsel of record in this case at the addresses shown by placing same in the United States Mail, postage prepaid, on this the 12th day of August, 1981:

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